No. 73-1102

In the
Supreme Court of the United States

October Term, 1973

TRANSCON LINES,

Petitioner,

vs.

XEROX CORPORATION,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL, SECOND APPELLATE DISTRICT, STATE OF CALIFORNIA

BRIEF FOR RESPONDENT IN OPPOSITION

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OPINION BELOW

The opinion of the Court of Appeal, Second Appellate District, State of California and the order of the Supreme Court of the State of California denying a hearing are set forth in Appendix "A" to the Petition.

JURISDICTION

Respondent and Petitioner agree that the subject matter of the within litigation is encompassed by the Interstate Commerce Act, 49 U.S.C. § 1 *et seq.* (the "Act") and the statute of limitations applicable to the within action is the contractual two year and one day period provided in Section 2(b) of the Uniform Domestic Bill of Lading

(the "Uniform Bill") promulgated under Section 20(11) of the Act. The within action was authorized to be filed in state court by Section 20(11) of the Act. Section 20(11) of the Act and Section 2(b) of the Uniform Bill are set forth in the Appendix to the Petition.

After initial discovery by the parties, Petitioner moved for summary judgment pursuant to Section 437c of the California Code of Civil Procedure on the ground that the action was barred under Section 2(b) of the Uniform Bill because not brought within two years and one day after written notice from Petitioner to Respondent disallowing a freight damage claim submitted by Respondent. Disposition of Petitioner's initial motion for summary judgment and subsequent motion to reconsider and the appellate proceedings resulting therefrom are as set forth in the Petition.

Jurisdiction of this Court is asserted by Petitioner on the basis of 28 U.S.C. §1257(3), set out in full in the Appendix to the Petition. As set out more fully herein, this Court is without jurisdiction under such statute because (1) under Section 577 of the California Code of Civil Procedure there is no "final judgment or decree" for this Court to review, and (2) there is no substantial "federal question" presented meriting resolution by this Court.

QUESTION PRESENTED

Whether a particular form notice dated April 10, 1969 from Petitioner to Respondent constituted an unequivocal denial of Respondent's concealed damage claim sufficient to commence the running of the two year and one day statute of limitations in Section 20(11) of the Act and Section 2(b) of the Uniform Bill for the filing of the within action by Respondent.

STATUTES INVOLVED

28 U.S.C. §1257(3), 49 U.S.C. §20(11) and Section 2(b) of the Uniform Bill are set forth in the Appendix to the Petition. Sections 437c and 577 of the California Code of Civil Procedure are discussed herein.

STATEMENT

A. **Basis of the Action.**

Respondent is a New York corporation whose business includes the production of photocopying machines. Petitioner is a California corporation and a common carrier by motor vehicle as defined in 49 U.S.C. §303(14), and is engaged in the transportation of property in interstate commerce. On October 28, 1968, Respondent delivered to Petitioner at Respondent's plant in Blauvelt, New York three shipping crates for carriage to San Antonio, Texas. One of these crates contained a copying machine (the "Machine") which is the subject of the present action. At the time and place of delivery to Petitioner, the Machine was sound and in good working order.

On November 7, 1968, the Machine was delivered in San Antonio, Texas. Thereafter, it was discovered that the Machine was severely damaged and Respondent submitted its damage claim to Petitioner together with a copy of the damage report which described "major concealed damage" to the Machine. On about February 26, 1969, Petitioner issued written acknowledgment of the claim.

Thereafter, Respondent received a printed form letter from Petitioner dated April 10, 1969. On this form letter, by typewriter, Petitioner had marked two boxes, namely: one reading, "Your claim declined for following reasons," and another reading, "Shipment was delivered

clear." The term "delivered clear" in the parlance of the shipping industry means that no visible damage was noted by the consignee upon delivery of a shipment. Since Respondent's claim was for *concealed damage,* it was evident that Petitioner had either misinterpreted Respondent's claim or failed even to consider it, and on April 17, 1969 Respondent resubmitted the damage claim with a letter pointing out that the claim was for concealed, i.e. hidden, damage to the Machine.

Thereafter, there were a number of telephone conversations initiated by Respondent to a representative of Petitioner regarding the claim. In none of these conversations was there any indication by Petitioner that a final disposition of Respondent's claim has been made. On July 29, 1969, Petitioner sent a letter to Respondent stating that the claim had been sent to the delivering carrier "for additional investigation," and further stated that "*upon conclusion of their investigation, disposition of your claim will be made.*" (Emphasis added) There was no further contact between Respondent and Petitioner concerning the claim until October 1, 1969, and on about that date Respondent received a letter from Petitioner disallowing the concealed damage claim.

Until the filing of the present lawsuit in June 1971, there was no further contact between the parties relating to the claim. At no time prior to the initiation of this litigation did Petitioner indicate that it understood or considered its form letter of April 10, 1969 to be the final rejection of Respondent's claim.

B. **Prior Proceedings in the Action.**

On June 16, 1971, the within action was filed by Respondent in the Superior Court, Los Angeles, Cali-

fornia, to recover for the in transit damages to the Machine. After preliminary discovery, Respondent filed a motion for summary judgment asserting that the period of limitations commenced to run as of the date of Petitioner's form letter of April 10, 1969; that the period of limitations applicable to the claim was two years and one day; and that since the complaint had been filed more than two years and one day after April 10, 1969, the action should be dismissed. After first denying Petitioner's motion, on a motion for rehearing the trial court determined that the applicable period of limitations had run, and that Respondent's action was therefore barred, and awarded judgment dismissing the action. Respondent appealed.

The Court of Appeal, Second Appellate District, State of California, determined that the period of limitations did *not* commence to run on April 10, 1969, but rather on October 1, 1969, when Petitioner finally and unequivocally denied Respondent's claim and, thereafter, denied Petitioner's Petition for Rehearing. Subsequently Petitioner filed a Petition for Hearing in the California Supreme Court, and after denial of such petition filed its Petition with this Court.

ARGUMENT

The issue raised by Petitioner's motions for summary judgment is exceedingly narrow, namely whether a particular form letter, together with the markings in two "boxes" thereon, sent by Petitioner to Respondent with respect to a single damage claim was a sufficiently unequivocal disallowance of that claim to commence the running of a contractual statute of limitations which the parties agree is applicable to this action. Despite Peti-

tioner's labored attempts to enlarge this question to an issue of significance to the entire transportation industry, the issue remains one of interpretation of a single document in the context of transactions between Petitioner and Respondent regarding a single damage claim arising out of one freight shipment. No amount of semantics or histrionics by Petitioner can elevate this simple issue to a substantial question of federal law meriting this Court's review on certiorari.

As a result of its efforts to create for this Court a significant question of federal law, Petitioner has overlooked the absence of an elemental requirement for the exercise of this Court's jurisdiction under 49 U.S.C. § 1257(3), namely, the requirement that there be a "final judgment or order" for this Court to review. The within Petition is the third petition filed by Petitioner, each to review a decision of the Court of Appeal, Second Appellate District, State of California. That decision, however, is not, under federal or California law, a final judgment in the action, but rather simply overrules one of the defenses to the action raised by Petitioner and returns the action to the trial court for further proceedings, and the ultimate entry of a final judgment. Had the decision of the California Court of Appeal overruling Petitioner's motion been made by the trial court, it would have been neither a final judgment nor appealable under California law. The fact that such decision was rendered by an appellate court instead does not change such result.

Even apart from the absence of jurisdiction and the narrowness of the issue involved in the action, on these individual facts the decision of the California Court of Appeal was manifestly correct and should not now be

disturbed by this Court. Although Petitioner parades before this Court asserted dire consequences which will result from the decision in this action, it is obvious that such claims are at best irrelevant and at worst totally unfounded. In determining the simple, limited issue herein presented, the California Court of Appeal correctly determined that this particular carrier in this particular set of facts did not, in its form letter of April 10, 1969, provide the unequivocal claim disallowance required by the statute of limitations, and could not claim the benefit thereof in this single action. Presumably, Petitioner could avoid any future question of the kind involved in this action by simply changing its form letter.

I. THERE IS NO FINAL JUDGMENT AS REQUIRED BY 28 U.S.C. § 1257(3).

28 U.S.C. § 1257 provides, in part, that *"final judgments or decrees rendered by the highest court of a state in which a decision could be had"* may be reviewed by this Court in the manner set out in the three subparagraphs of the Section, including a petition for certiorari. But, as the Section clearly states, such review is limited to actions meeting the requirements set forth. Respondent does not challenge that the decision for which this Court's review is sought was rendered by the highest court from which a decision could be had. Respondent does challenge Petitioner's unstated premise that such decision is a "final judgment or decree." Federal and California decisions are in agreement that the decision is not a final judgment in this action. A brief analysis of the proceedings in the action demonstrates this.

The proceeding giving rise to the appellate review resulting in the Petition was not a trial of or decision upon the merits of the action. The Petition herein evolves from Petitioner's motion for a summary judgment in the action brought under Section 437c of the California Code of Civil Procedure, and a renewal of that motion after its initial denial. After the second hearing on the motion, the trial court granted the motion and entered a judgment dismissing the action and Respondent appealed. Upon appeal the order granting the judgment was reversed by the California Court of Appeal, and as a result, the judgment ordered to be vacated. The California Supreme Court denied a hearing. The effective and logical result of this sequence, then, is identical to a denial of Petitioner's motion for summary judgment in the first instance; i.e. the motion for judgment is denied and the action proceeds in normal course. The decision, then, determines nothing more than that the action be remanded for further proceedings in the trial court. As this Court has previously held on numerous occasions, when a state court judgment is reversed by an appellate court and an action remanded for further proceedings, the appellate court decision is not a final judgment or order and cannot be reviewed by this Court, whether or not a federal question is involved. *McComb v. Commissioners of Knox County, Ohio,* 91 U.S. 1 (1875); *Great Western Telegraph Co. v. Burnham,* 162 U.S. 339 (1896); *Haseltine v. Central National Bank,* 183 U.S. 130 (1901). Since no dismissal of the action was ordered, and no attempt made to determine the ultimate rights of the parties to the litigation, finality is clearly lacking. *McComb v. Commissioners of Knox County, Ohio, supra; Meagher v. Minnesota Thresher Mfg. Co.,* 145 U.S. 608 (1892); *Clark v. City of Kansas City, Kansas,* 172 U.S.

334 (1899); *Missouri & Kansas I. R. Co. v. Olathe*, 222 U.S. 185 (1911); *Jung v. K & D Mining Co.*, 356 U.S. 335 (1958). As this Court stated in discussing the finality of a decision necessary for this Court's review in *Market Street R. Co. v. Railroad Commission*, 324 U.S. 548 (1945):

> Final it must be in two senses: it must be subject to no further review or correction in any other state tribunal; it must also be final as an effective determination of the litigation and not of merely interlocutory or intermediate steps therein. It must be the final word of a final court. (at 551)

As set forth above, the decision of which Petitioner complains is not a final determination in accordance with the definition set out in this Court's decisions.

Further, California law is in accord with the federal cases. Section 577 of the California Code of Civil Procedure states that "A judgment is the final determination of the rights of the parties in an action or proceeding." Because a judgment is the final determination, there can be only one final judgment in an action. *Bakewell v. Bakewell*, 21 Cal.2d 224 (1942); *Bank of America Nat'l Trust & Savings Assoc. v. Superior Court*, 20 Cal.2d 697 (1942); *Nicholson v. Henderson*, 25 Cal.2d 375 (1945); *Shapiro v. Equitable Life Assur. Soc. of U.S.*, 76 Cal.App.2d 75 (1946). Because a judgment is the final determination in an action, an order denying a motion for summary judgment in an action cannot be a judgment, final or otherwise, and cannot constitute an appealable judgment. *Nevada Constructors, Inc. v. Mariposa Public Utility Dist.*, 114 Cal.App.2d 816 (1953). Rather, an appeal may be had by a party unsuccessful on such a motion only from a judgment entered after a trial following denial of

the motion. *Bank of America Nat'l Trust & Savings Assoc. v. Superior Court of San Diego County,* 4 Cal. App.2d 435 (1970). An order denying a motion for summary judgment does not determine any issue, its effect being merely a finding that there is an issue of fact to be tried. *Schulze v. Schulze,* 121 Cal.App.2d 75 (1953).

In summary, the Petition filed here is prematurely filed because the entry of a final judgment necessary for this Court's jurisdiction has not yet occurred. Rather, Petitioner asks for review of an interlocutory order in the action, a review for which there is no basis under 28 U.S.C. §1257(3).

II. THERE IS NO IMPORTANT QUESTION OF FEDERAL LAW PRESENTED.

At no time has there been any dispute between the parties to this litigation concerning which statute of limitations applies to the facts here involved: both agree that the applicable period is two years and one day, as provided in Section 2(b) of the Uniform Bill, derived from Section 20(11) of the Act. There has likewise been no dispute between the parties as to the nature of the event which triggers the running of the period of limitations, namely, the giving of written notice by the carrier to the claimant. Finally, there is no dispute over the fact that the carrier, Petitioner, did give such written notice so as to commence the running of the period of limitations.

The issue which was in dispute, and which was presented to the trial court and to the California Court of Appeal is: *When* did Petitioner give to Respondent such notice as to commence the running of the applicable period of limitations against Respondent's claim for con-

cealed damage? This issue can perhaps also be stated as: Did Petitioner's form letter of April 10, 1969 constitute such notice as to commence the running of the period of limitations against Respondent's claim for concealed damage to the Machine? Petitioner insists, however, that implicit in the decision of this question is a rejection of an entire framework of law involving the Act and numerous federal decisions and that the decision requires this Court to state in a written opinion the requirements of a written notice disallowing a freight claim (Petition, P. 7). Respondent submits that the decision of the California Court of Appeal neither runs contrary to such established law nor presents to this Court a substantial question of federal law meriting this Court's review.

As indicated above, no dispute exists among the parties as to the applicable statute of limitations, the period provided for therein and the event necessary to trigger the statute. Section 2(b) of the Uniform Bill, Section 20(11) of the Act and the numerous cases referred to by Petitioner clearly provide that (a) when a carrier give written notice unequivocally denying a shipper's freight damage claim (b) a period of two years and one day automatically commences to run in which a shipper must file an action to recover on such claim or be barried and (c) such period for filing an action cannot be subsequently tolled by the actions of either party. Although Petitioner embellishes these premises with lengthy historical commentary and explanations of their mechanical application (Petition, PP. 8-10), it is unclear what, if any, relevance such discussion has to the issue in dispute. There is nothing in the opinion of the California Court of Appeal to indicate that it took issue with any of the clearly established and unquestioned premises set out above. Rather, the California Court of Appeal quite explicitly

recognized the applicability of these premises to the within action (Petition, Appendix PP. 1-2).

Against this legal framework, the California Court of Appeal simply examined a particular notice asserted by one carrier to be the unequivocal written notice of disallowance required by the relevant law to start the period provided by the statute of limitations. Upon review of the form notice as filled out and forwarded to Respondent, the California Court of Appeal determined that in this case, this particular notice did not constitute the unequivocal notice required, and therefore the statute of limitations had not commenced to run from the date on which it was sent. In short, the California Court of Appeal reviewed one isolated transaction to determine when the statutory notice had been provided. This decision does not, as Petitioner asserts, run contrary to the weight of authority (Petition, P. 8) and does not, as Petitioner implies, create a precedent requiring such notices to decline a claim without explanation (Petition, P. 10). The only issue which the decision determines is that the particular notice at issue in this case was not an unequivocal written notice of disallowance as required.

The resolution of this issue, an issue necessarily limited in application to these parties and this transaction, neither requires nor merits the review of this Court and does not require the establishment by this Court of any general set of requirements for a notice in writing disallowing a freight claim under the Act. Accordingly, this issue, the only one presented in the within action, does not present a substantial question of federal law justifying exercise of the Court's power of review under 28 U.S.C. §1257(3).

III. THE DECISION BELOW IS CLEARLY CORRECT.

Petitioner sets out at length asserted dire consequences to the carrier industry flowing from the allegedly incorrect decision of the California Court of Appeal (Petition, PP. 11-15). Petitioner sets out three purported consequences which require review of the decision. Although Respondent does not wish to unduly lengthen this brief by exhaustive response to such contentions, Respondent believes that a short discussion of the points raised by Petitioner will show that such contentions are without merit.

First, Petitioner asserts that the tendency of the decision is to restrict the wording of notices of disallowance, a tendency which Petitioner asserts will force carriers to eliminate useful discourse with shippers regarding damage claims or will lead to voluminous record storage problems for carriers (Petition, PP. 11-13). To so interpret the decision loses sight of its quite narrow scope. As discussed *infra*, all that the decision determines is when an unequivocal notice of disallowance was given in this particular case and with respect to a particular claim. In so doing, it simply affirms the long standing law, that an unequivocal notice of disallowance of a freight damage claim is necessary to commence the period for filing an action. The decision neither purports to nor actually affects other communications between shippers and carriers with respect to damage claims. The one point, the only point, decided by the Court is that there must be an unequivocal written disallowance. Contrary to Petitioner's assertions, nothing is stated nor implied which would prohibit explanation or discussion of the reasons for disallowance, either before or after the unequivocal written notice of disallowance. Carriers and shippers remain free to engage in such dialogue subject to normal limita-

tions of expense and the size of the claim involved. That such dialogue may require record keeping regarding such claims is not a new development occasioned by the decision and certainly is irrelevant to the decision of the California Court of Appeal. Carriers remain free to correspond as much or as little regarding freight damage claims as they choose, since the "tendency" asserted by Petitioner does not, upon examination, exist.

Second, Petitioner asserts alleged unequal treatment of carriers from the requirement of unequivocal written disallowances of freight damage claims while allowing shippers latitude in form of claims (Petition, PP. 13-14). For two reasons, the argument is unconvincing. First, the argument is irrevelant to the decision in the action. The decision does not attempt to set a standard for written notices of disallowance. The standard is in the statute itself, and the decision merely interprets a document in the light of that statutory standard. Petitioner's argument is misdirected. Second, Petitioner's argument loses sight of the basis thrust of the provisions of Section 2(b) of the Uniform Bill and Section 20(11) of the Act relating to written notices of disallowance. Quite clearly these provisions are for the benefit of the carrier in cutting off the right of a shipper to file an action. Provisions of this type have quite properly been strictly construed against the party seeking to take advantage of them, and where an act (such as a written notice) is required to trigger them, such act has been closely scrutinized. In short, Petitioner's argument that the statute and contract allowing it to come within the purview of a statute of limitations beneficial to it alone be construed broadly in its favor is not well taken.

Third, Petitioner asserts that the concept of a final (i.e., unequivocal) disallowance has no place in the field

of freight damage claim treatment (Petition, PP. 14-15). In addition to the obvious fact that the statute is to the contrary and requires such a disallowance to commence the running of the period for a shipper's filing of an action, Petitioner's argument is unsound for another reason. As Petitioner itself notes, discussion of claims may occur over a lengthly period before *and after* the disallowance of all or a part of a damage claim (Petition, P. 14). Yet, a shipper has, under the statute, a very precise time period if his claim is finally disallowed in which to file an action. That he know when this period commences (and terminates) is critical to exercise of his rights, whatever continued discussion may ensue after rejection of his damage claim. Common sense, as well as long standing legal principles, dictate that a shipper be entitled to an unequivocal notice of disallowance under such circumstances and any ambiguity arising with respect to a purported disallowance be resolved against the carrier. As provided in Section 1654 of the California Civil Code:

> In cases of uncertainty not removed by the preceding rules, the language of a contract should be interpreted most strongly against the party who caused the ambiguity to exist.

The obvious prejudice occasioned by elimination of the requirement that a purported disallowance be unequivocal and that ambiguities in purported disallowances be construed against carriers is a complete answer to Petitioner's argument.

CONCLUSION

For the reasons set forth, this Court should deny the issuance of a writ and dismiss the Petition filed herein.

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